Supreme Court, U.S.
FILED
AUG 2 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1873

In the Supreme Court of the United States

OCTOBER TERM, 1985

GEORGE JOSEPH WEIDE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

TABLE OF AUTHORITIES

Page

Cases:

Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 5

Chappell v. *Wallace*, 462 U.S. 296 3-4

Moor v. *County of Alameda*, 411 U.S. 693 5

Sanders v. *United States*, 594 F.2d 804 3

Statute:

10 U.S.C. (& Supp. I) 1552 3

10 U.S.C. 1552(a) 4

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1873

GEORGE JOSEPH WEIDE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner claims that his honorable discharge from the United States Army in 1978 was improper because an evaluation he received in 1971 was prepared by the wrong officer.

1. Petitioner entered the Army as a Second Lieutenant in 1970 and was assigned to the Second Battalion, 10th Infantry Division at Fort Carson, Colorado. In November 1970, he was temporarily assigned to a Marksmanship Training Unit (MTU). Upon returning to the Second Battalion in March 1971, petitioner served simultaneously, but in separate capacities, under both Captain Voris and Major Park. Petitioner was promoted to First Lieutenant in June 1971, and then transferred to another unit in mid-July. Captain Voris thereafter prepared, and Major Park indorsed, an Officer Efficiency Report (OER) evaluating petitioner's performance from December 1970 to July 1971. The evaluation ranked petitioner in the 77th percentile of officers in his grade and branch. Pet. App. 17a-19a.

In 1972, petitioner reviewed his military records and found that his MTU duty had not been recorded. He also noted that he had received lower marks on the OER prepared by Captain Voris than on the preceding OER. In 1973, petitioner informed the Military Personnel Center that an MTU officer should have prepared his OER for December 1970 to March 1971. Petitioner also contended that the OER for his Second Battalion duty should have been prepared by Major Park, not Captain Voris. The Personnel Center agreed that petitioner should have been rated by an MTU officer, and corrected petitioner's records to show the December 1970 to March 1971 period as unrated. However, the Center found no evidence that Captain Voris was not petitioner's proper rater for March to July 1971. Pet. App. 19a-20a.

Petitioner was promoted to Captain in 1974, on a temporary basis, but he was not selected for permanent promotion to Captain by selection boards in 1976 and 1977. In December 1977 and again in January 1978, petitioner applied to the Army Board for Correction of Military Records (Correction Board), challenging his OER for March to July 1971. These applications were denied. On February 1, 1978, not having been selected for permanent promotion to Captain by two successive selection boards, petitioner was honorably discharged and appointed to the reserves. Pet. App. 20a-21a.

In June 1978, petitioner again applied to the Correction Board. He requested that a new OER prepared by Major Park, which rated him in the 98th percentile, be substituted for the OER prepared by Captain Voris, and that he be reinstated to active duty. After referring petitioner's application to the Personnel Center, the Correction Board denied the request, finding no evidence that Captain Voris was not petitioner's proper rater. Pet. App. 22a-23a.

2. Petitioner filed suit in the Claims Court in 1982.* Relying primarily on *Sanders* v. *United States*, 594 F.2d 804 (Ct. Cl. 1979), the court granted summary judgment for the government (Pet. App. 16a-27a). The court first concluded that a decision of the Correction Board may be reversed only if it is "arbitrary or capricious or in bad faith, or unsupported by substantial evidence, or contrary to law, regulation or mandatory published procedure." Pet. App. 25a, quoting *Sanders*, 594 F.2d at 811. In this case, the court concluded, there was nothing illegal about the Correction Board's finding that Captain Voris properly completed petitioner's OER in 1971 (Pet. App. 26a). Second, the court noted that "a decision of the Correction Board which is in error or unjust is reversible only if it is substantial and prejudicial to plaintiff" (*id.* at 25a). Since petitioner was twice promoted after 1971, and received nine OERs after 1971, the court concluded that the 1971 OER did not "substantially affect[] the Army's decision not to promote plaintiff" to Captain permanently (*id.* at 27a). Because it concluded that the government was entitled to summary judgment on these grounds, the court did not reach the government's argument that petitioner's claim was barred by laches (*ibid.*).

The court of appeals affirmed (Pet. App. 1a-10a). It first addressed petitioner's contention that, under 10 U.S.C. (& Supp. I) 1552, the Secretary of the Army, or another political appointee, must personally consider requests to correct military records. The court of appeals noted that petitioner had failed to raise the issue below (Pet. App. 3a). Assuming arguendo that the issue nonetheless was properly presented, the court rejected petitioner's argument. The court observed that this Court, in *Chappell* v. *Wallace*, 462 U.S.

---

*Petitioner filed suit in the Claims Court in 1981, but the petition was dismissed without prejudice for verbosity (Pet. App. 23a n.5).

296, 303 (1983), recognized that the Secretary acts through Correction Boards. Indeed, Section 1552(a) provides that the Secretary, "under procedures established by him," acts through "boards of civilians of the executive part of that military department." The court of appeals determined that "Congress did not implicitly mandate or intend that the Secretaries of the various military departments become personally involved in record correction procedures" (Pet. App. 5a-6a).

The court of appeals next rejected petitioner's contention that the Correction Board should have granted him relief. The court noted that "[a] rebuttable presumption of regularity, correctness, and good faith attaches to administrative actions, including the actions of military administrators" (Pet. App. 6a). In this case, the court held, petitioner had failed to rebut that presumption, presenting only "conclusory statements" suggesting the falsification of records by military personnel (*id.* at 6a-7a).

Finally, the court of appeals noted that the laches question was not before it since the Claims Court had not reached that issue (Pet. App. 2a).

3. None of the four questions raised by petitioner warrants this Court's attention. Petitioner's contention (Pet. 15-16) that the Secretary of the Army must personally review records correction matters is frivolous. Petitioner fails to cite any authority in support of this argument, which runs counter to the language of Section 1552(a).

Petitioner contends (Pet. 16-18) that no "presumption of regularity" applies in this case, repeating his conclusory allegations that "military personnel administrators tacitly recognized and 'covered up' blatant falsehoods" (Pet. 17). Petitioner argues that the Correction Board erred in determining that Captain Voris properly completed his OER in 1971, basing this contention primarily on the fact that

Major Park, who indorsed the 1971 OER, prepared a substitute OER in 1978, a fact considered by the Correction Board. Petitioner does not even attempt to rebut the Claims Court's conclusion that, in any event, he was not prejudiced by the ranking he received in 1971 from Captain Voris. There is no reason for this Court to review these factual questions.

Petitioner's third contention (Pet. 18-21), that he was denied due process since the Correction Board did not grant him a hearing, was not raised or considered below. This Court does not ordinarily consider issues under such circumstances (see, *e.g., Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)), and there is no reason to depart from that practice in this case. The Correction Board explained that a hearing was not required since petitioner had failed to demonstrate "probable material error or injustice" (Pet. 21), and petitioner has not corrected that failure.

Petitioner's fourth contention (Pet. 21-26) relates to the government's laches defense, which was not reached below. He argues that "[t]he very fact that the Claims Court did not decide the case of Petitioner on the basis of laches, provides one of the strongest arguments for examining the abuses which are being perpetrated by misapplication of that doctrine" (Pet. 21). This novel argument, which is contrary to this Court's practice (see, *e.g., Moor* v. *County of Alameda*, 411 U.S. 693, 696 n.3 (1973)), totally lacks merit.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Acting Solicitor General

AUGUST 1985